NO. 782

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

Alfred Young Chick and William Flanders Lewin, Co-partners under the firm name and style of A. Y. Chick & Company,

Appellants,

vs.

The Mercantile Trust Company and the San Joaquin Electric Company,

Appellees.

Brief of Mercantile Trust Company, Appellee

ALEXANDER & GREEN,
CHAS. MONROE,
Solicitors for The Mercantile Trust Company, Appellee.

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BRIEF OF THE MERCANTILE TRUST COMPANY.

Statement of the Case.

The bill was filed herein on the 12th of August, 1899, the defendant entered its appearance on October 2nd, and on June 13th, 1900, after several continuances, defendant, The San Joaquin Electric Company, filed its answer, in which none of the allegations of the bill were denied.

On October 30, 1899, and before answer of the defendant was filed or was due, a paper styled, "Petition

in Intervention, Bill of Intervention, and Notice of Motion to Intervene of Alfred Y. Chick and William Flanders Lewin, partners as A. Y. Chick & Company," was served upon complainant and defendant and next day upon the receiver. The notice was for the 6th day of November. The paper was not filed at that time, but on November 6th an order was made that the motion be continued for hearing until the next rule day. This petition for intervention was continued from time to time, and was finally filed on February 5th, 1900, and came on for hearing a few days subsequent. Objection was made that the petition was verified by counsel instead of by one of the parties and upon information and belief, and the court declined to allow the intervention on such a showing. The applicants took time to have their papers verified.

These proceedings are not shown in the transcript of record, but the complainant with the consent of the intervenors will file, if allowed by the court, a transcript certified by the clerk of the Circuit Court for the southern district of California, containing a transcript of the proceedings not contained in the printed transcript of the record.

On the 2nd day of April, 1900, a new petition in intervention was filed, which was verified in absolute terms by A. Y. Chick, one of the petitioners. The matter came up for hearing on the 9th of April, pursuant to notice given by the attorneys for the intervenors. [Transcript, p. 54.]

On the 23rd of April the court made an order allowing the bill in intervention to be filed and in the same

order denied the application of the complainant to file an answer to the petition in intervention which was presented on that day. The answer is found on pages 55–58 of the transcript and the order on page 59. The court took the position that the proper practice was for the complainant to join issue with the intervenors upon the bill in intervention and that testimony should be taken upon the issues presented thereby.

The paper filed in pursuance of the order was styled "Bill of Intervention and Answer of Alfred Young Chick and William Flanders Lewin," and a part of it purported to be an answer. [Transcript, pages 60–74.] Accordingly, on May 24th, 1900, the complainant moved to strike out so much as purported to be an answer, and particularly to strike out from and including line 9, page 2, to and including last line of page 5. The portion which the complainant moved to strike out is correctly copied in the assignment of errors on pages 352–357 of the transcript. The hearing of this motion was unavoidably delayed and was finally heard on the 4th of September, 1900.

The complainant filed its answer to the bill of intervention on the 4th of June, 1900.

After the pleadings were filed and settled, time was given to take testimony upon the questions raised by the bill in intervention and the answers thereto and this testimony was not completed until about the first of April, 1901.

The intervenors thereupon moved the court for an order requiring the receiver to apply all moneys received by him from the operation of the plant of the

defendant over and above necessary operating expenses to the payment of accrued and accruing interest on the bonds sued on in this action until such interest is paid and that this suit be continued until the same is paid and satisfied by the surplus earnings of the defendant company. [Transcript, p. 318.] The complainant moved the court to set down the hearing upon the bil in intervention and answers thereto, and afterwards moved the court to revoke the order allowing the bill in intervention to be filed, and the court set the hearing upon the bill in intervention and answers thereto and upon the testimony taken upon the issues presented thereby, and also upon the motions of the complainant and intervenors above mentioned. The motions of the complainant above referred to are not included in the printed transcript, but are set out in the additional transcript presented to the court.

The position taken by the complainant is and always has been that the bill of intervention should not have been allowed unless it was shown that the trustee had been guilty of fraud or neglect, and that that matter could not be shown by an *ex parte* application sworn to by one of the applicants, and that an opportunity should have been given the complainant to disprove the allegations of the petition before the bill in intervention was allowed to be filed, either upon an order to show cause why the bill should not be filed, or by affidavits, but the court, as above stated, took the position that the application to intervene being verified absolutely by one of the intervenors, the bill might be filed and issue joined thereon and testimony introduced by

both parties upon those issues the same as in a suit upon bill, answer and replication, and that is what was done and no testimony was taken except upon those issues and none was necessary because the answer of the defendant to the original bill did not deny any of the allegations of said bill.

ARGUMENT.

The first assignment of errors made by appellants relates to the striking out by the court of that portion of the bill in intervention which purported to be an answer. The action of the court was based upon the motion of the complainant. [Transcript, pp. 78-9.] The court will notice that three reasons were assigned for said motion: 1. Because no leave had been given by the court to file any answer; 2. Because it was irregular and improper for an answer and bill to be contained in the same paper; and, 3. Because the paper filed prayed for affirmative relief and no affirmative relief could be obtained by an answer. The motion was made on the 24th of May, 1900, but the decision was unavoidably delayed and the order allowing the motion was not made until the 4th of September, 1900, [Transcript, pp. 121-2] and the court in allowing the motion did not state upon what ground it was allowed, but, of course, if it was right to allow it on either ground, there was no error.

Referring to the paper itself [Transcript, pp. 60-74.] the court will notice that it is styled, "Bill in Intervention and Answer of Alfred Young Chick and William Flanders Lewin," and the intervenors in the introduc-

ory clause of the paper state that they file their bill of intervention and answer to the bill of complaint of the complainant, and then, after making the jurisdictional allegations, to show that the citizenship of the parties was such as to enable them to maintain their action both against the complainant, the defendant and the receiver, they start in with an answer to the original bill of complaint, and this answer continues from the middle of page 61 of the transcript to the middle of page 66, ending with the admission that the matter in controversy exceeds five thousand dollars, exclusive of interest and costs. From there on the allegations are affirmative and such allegations as may properly be contained in a bill, but are improper and irregular in an answer. The prayer, on page 73, like the rest of the paper, has a double aspect. So far as it is based upon the answer it is for a dismissal of the bill of complaint. So far as it based on the bill in intervention it is for affirmative relief. So that we not only have in the same paper both bill and answer, but the parties are different, the bill being against the original complainant and the original defendant and the additional parties, John J. Seymour and John S. Eastwood, and the answer being the answer of the intervenors alone against the original bill of the Mercantile Trust Company.

It has been decided that it is irregular to unite a cross-bill and an answer in the same pleading.

1 Foster's Federal Practice, 293;

Hubbard v. Turner, 2 McLean, 519, 540; 12 Federal Dec. 783;

Morgan v. Tipton, 3 McLean, 339-344, 17 Fed. Dec. 762.

And it is just as irregular to unite a bill of intervention and an answer in the same pleading. If it was proper at all for these parties to be allowed to intervene, it was because it was proper to make them defendants and if they were made defendants they of necessity would be permitted and required to file an answer which should be a paper by itself meeting the allegations of the original bill. If after being allowed to intervene and made parties defendant, they desired affirmative relief, they could obtain leave and file a cross-bill.

It is, of course, elementary that a defendant can obtain no affirmative relief against the plaintiff by an answer beyond what results necessarily from a denial of the prayer of the original bill.

1 Foster's Fed. Practice, 286;

Chapin v. Walker, 6 Fed. Rep. 794;

Ford v. Douglas, 5 How. 143; Bk. 12 L. Ed., 89;

Carnochan v. Christie, 11 Wheat., 446; Bk. 6 L. Ed., 516.

The intervenors never asked or obtained leave to answer the original bill, but took testimony with a view of proving the allegations of the bill in intervention.

It is apparent from the transcript that the purpose of the Circuit Court was not to give the applicants standing as defendants in the case, but simply to allow them to file their bill in intervention and have issue joined upon the allegations of that bill for the purpose

of determining whether the applicants were entitled to defend against the original bill or not

As early as November, 1899, the applicants for leave to intervene presented their first petition, which was also called a bill. Notice was given that on the 6th of November, 1899, they would apply for leave to file their petition and bill. Nothing was filed at that time, but the application for leave to intervene was continued from time to time until the 5th of February, 1900, when they did file the paper without any order, so far as appears from the record. This petition and bill were verified by George E. Church, one of the solicitors for petitioners, who simply stated that the allegations were true, so far as they related to his own acts, and so far as they related to the acts of others, he believed them to be true. As the paper verified did not purport to refer to his own acts at all, the verification was simply that he believed the allegations to be true. This paper came on for consideration on the 19th of February, and was continued to be called up on notice of the petitioners. The real reason for that continuance was that the court required the petition to be verified absolutely and by one of the applicants. Accordingly, on March 30, 1900, the solicitors for the applicants served upon complainant and defendant notice that on Monday, the 9th day of April, 1900, they would present to the court the petition for leave to intervene which is contained on pages 44 to 54 of the transcript. That petition was verified absolutely by A. Y. Chick on the 2nd of March, 1900, and was filed on the 2nd day of April. On the 23rd of April the complainant

filed its answer to the petition denying all its allegations, which answer is found on pages 55 to 58 of the transcript. This filing was without leave of the court, and the matter coming on the same day before the court, it was ordered that the application for leave to file said answer be denied and that the petition to intervene be granted. So that the bill in intervention was allowed to be filed without any opportunity being granted to the complainant to controvert the allegations contained therein, the idea being that the complainant should have an opportunity to controvert these allegations by pleadings directed to said bill.

After the portions of said bill purporting to be an answer had been striken out, the parties who were made defendants to said bill in intervention filed answers thereto which were found on pages 80, 94 and 108 of the transcript. No objection was made by the intervenors to that method of determining their rights, for they filed replications to these answers. [Transcript, pp. 105-108 and 119-120.] So that the issues were complete upon the questions raised by the bill in intervention, and upon those questions alone, and testimony was taken upon the issues made by those pleadings. In that connection attention is called to the order appointing the special examiner [Transcript, p. 197] which was made on motion of counsel for intervenors, and the examiner was appointed to take the testimony "in the matter of the intervention of Alfred Young Chick *et al.*" The hearing was upon the bill in intervention and answer and replication thereto, and the order made upon that hearing is the order appealed

from. So that it is clear that the purpose of the court all the time, after the petition for leave to intervene was granted, was to enable the parties to determine whether the intervenors were entitled to defend against the original bill or not, and this is evidently the understanding of the intervenors, because in the early part of their brief they complain that the court held that all they could do under the bill in intervention was to take evidence in support of their allegations, and that was in effect to require them to prove the facts in support of their petition for leave to intervene and to hold in effect that if they made proof establishing the necessity for the complaining bond holders to intervene, then they might plead in answer to the bill. They did not establish the necessity for the complaining bond holders to intervene and never put themselves in a position where they were entitled to answer the original bill. Of course, if the court had allowed the complainant to file answer to the original petition for leave to intervene and to present evidence in opposition to the allegations of the petition, then the whole matter might have been determined before the bill was filed, but the court chose to allow the bill to be filed without any opportunity to the complainant to offer proof to controvert its allegations, and then required the intervenors to prove their allegations and permitted the complainant to meet such proof and to have all those questions decided before the intervenors could plead to the original bill.

The portion of the bill which purported to be an answer was filed without leave and without any right, and the intervenors acquiesced in the order of

the court, for, as already stated, they made no application for leave to file an answer to the original bill and did not file any without leave. They were not precluded by the order of the court from asking leave to file such an answer, because the order of the court was simply that the matters complained of should be stricken from that paper which purported to be a bill.

Intervenors complain, in their brief, that they were prejudiced by the order, because it prevented them from proving that no request had been made upon the trustee by a majority of the bondholders to bring the suit, which was one of the matters covered by the denial stricken out of their bill. That they were not prejudiced will be amply shown by reference to that part of the paper which was not stricken out. They allege in their bill "that the said officers of said company and the said bondholders unlawfully and fraudulently conspired together to induce the complainant, the Mercantile Trust Company, as trustee, and its officers, to foreclose the said mortgage or trust deed by suit against said defendant company, with the object and purpose of carrying out said scheme for the reorganization of said company in the interest of said bondholders and of said officers of the defendant company; and in pursuance of said unlawful and fraudulent scheme, the officers of said company, having laid the foundation for the right of said trustee to foreclose said mortgage or deed of trust, or attempted so to do, *the said bondholders, for the purpose of bringing about said foreclosure and reorganization, and being sufficient*

in numbers to authorize them so to do, under the terms of said mortgage or trust deed, requested or caused the said trustee to be requested by their agent or agents to bring suit to foreclose the said mortgage and sell the property of the defendant company described therein, not for the purpose of enforcing the collection of the amount due from said defendant to its bondholders, but for the sole purpose of bringing about such reorganization of said company in the interests of the bondholders requesting such foreclosure." [Transcript, p. 68.] Again, it was alleged that the officers of the defendant company "did facilitate the foreclosure of said mortgage by fraudulently and purposely and unnecessarily allowing the interest upon the said bonds to become and continue delinquent for the term of six months, whereby the right of the said trustee to foreclose the same became and was perfect, according to the terms of said mortgage or deed of trust." [Transcript, p. 69.]

It is somewhat difficult to understand how intervenors can claim to have been prejudiced by not being permitted to prove that a majority of the bondholders did not request the trustee to bring the suit, when they allege and admit in the part of the bill not stricken out that such request was made.

Again, the purpose of the motion was not to prevent the intervenors from proving any fact, but to strike out from the paper filed, matter which they were not authorized to include in such paper, and which was irregular to be joined with their bill. The striking out of admissions from the portion of the bill purporting to be an answer, certainly would not hurt anybody.

The allegations which were stricken out are all, without exception, repeated in the allegations which remain. The denials would have been proper as allegations in their bill. For instance, if it was material and they could have proved that no demand for payment was made or that no request was made by a majority of the bondholders that the suit be brought, those were matters which they ought to have alleged to enable them to intervene, but there were allegations remaining in the bill under which the matter stricken out could have been proved if it had been capable of proof. Proof was not offered not because a part of the paper was stricken out but because no proof could be produced.

The intervenors discuss several questions in their brief which we will notice, but which we deem absolutely immaterial. For instance, what does it matter whether the company was insolvent or not when the right to foreclose accrued, or whether there was then or is now no necessity for the foreclosure of the trust deed for the protection of the bondholders. It is admitted that the company did not pay interest which became due on the 1st of January, 1899, and that the default continued for more than six months. Foreclosure suits are not brought because there may be a necessity for such suits, but because parties have a cause of action and right to enforce it. What difference does it make to the holder of a mortgage whether the defendant can not pay or can pay and will not. If his interest is not paid, and the mortgage provides for it, he has a right to bring his suit, and the suit, when it is brought, can not be dismissed or stayed because the

property increases in value or becomes more productive. When was it ever the law that a suit for foreclosure, properly brought, could not be prosecuted because after the bringing of the suit the defendant was in a condition to pay current interest and something on back interest, so that it might pay the back interest up in the course of a few years. If a defendant in a foreclosure suit, properly brought, can have the suit dismissed even upon a tender of all the interest, mortgagors generally would like to know it. In this, when the suit was brought, the right to bring it was absolute and complete, and at that time the company was insolvent to such a degree, that under the decision, herein cited, the right to a receiver was perfect. What the condition of the company is now, has no bearing upon the right of the complainant to a decree.

The only question that is important is whether the suit was the result of fraud or collusion, but inasmuch as the intervenors have laid such stress upon the claim that the company was not insolvent, and that there was no necessity for a foreclosure, we will discuss these matters; and, first, the

SOLVENCY OF THE COMPANY.

Upon this point counsel for intervenors state in their brief that the question as to the insolvency of the company most necessarily relate to the end of the six months after the first default in interest occurred, which would be July 1st, 1899, and that the other side have treated the question as if it related to the time of the defalcation on January 1st of that year. It is not

true that we have treated the question as if relating to the condition of affair on January 1st, 1899, but the issues would permit us to so treat it, for the allegations of the bill in intervention relate to that time. Referring to the bill in intervention we find the following allegations: "That on or about the 1st of January, 1899, there fell due a semi-annual installment of interest upon said bonds * * * which amount of interest the said San Joaquin Electric Company neglected to pay, although possessed of abundant means and resources so to do." [Transcript, p. 67.] "That in the month of January, 1899, the said defendant, the San Joaquin Electric Company, had and possessed ample means, income and resources to meet all of its just debts and liabilities due and to become due, including the accrued and accruing interest on all of its said bonds; but instead of applying its said means to the payment of its obligations, including the said interest, its officers and directors, including the said John J. Seymour and John S. Eastwood, conspired together for the purpose of diverting, and did unlawfully and fraudulently divert its funds to other purposes, and purposely and intentionally avoided paying the interest on said bonds, for the fraudulent and unlawful purpose of enabling certain of the bondholders of said company as hereinafter alleged, to bring and maintain a suit to foreclose the mortgage or deed of trust." [Transcript, p. 67.]

Thus it will be seen that the allegations are that the conspiracy took place in regard to the payment due on the 1st of January, 1899.

Again "said officers * * did facilitate the foreclosure of said mortgage by fraudulently and purposely and unnecessarily allowing the interest upon the said bonds to become and continue delinquent for the term of six (6) months, whereby the right of the said trustee to foreclose the same became and was perfect." [Transcript, p. 69.] "That it was contrived and agreed by and between the parties to this action and said bondholders, at whose instigation the said foreclosure proceedings were begun as aforesaid, that the said defendant company should default in payment of interest on its bonds." "That in pursuance of said conspiracy, the said defendant company failed and refused to pay the interest on its said bonded indebtedness as it became due, though possessed of abundant means and resources so to do." [Transcript, p. 70.] "That the said defendant, San Joaquin Electric Company, is and was at the time said default in the payment of interest occurred, solvent and possessed of ample property, income and resources to meet all of its just debts and liabilities, including the interest on said bonds, and said interest might have been paid and would have been paid out of the ordinary revenues and receipts of said company, but for the fraudulent conspiracy above set forth." [Transcript, pp. 72-3.]

This bill does not appear to have been verified, but practically the same allegations are made in the petition, and that was verified in absolute terms, as already stated by A. Y. Chick on the 2nd of March, 1900.

It afterwards appeared by the testimony taken by the intervenors that the defendant company was act-

ually insolvent and unable to meet its interest on the 1st of January, 1899, and therefore, after the testimony was taken, they changed their ground and referred the insolvency to the 1st of July, 1899, although the allegations in their bill were not directed to that time.

All the testimony shows that the company was insolvent and unable to pay its interest at both dates. Certain statements were sent by Mr. Collier, secretary of the company, to one Charles H. Coffin. These statements are found in the testimony of Coffin in the transcript, pages 133 to 151. He then gave the following testimony:

Q. You have examined the figures, have you, that were submitted to you by the officers of the San Joaquin Electric Company, as shown in the statements which were furnished you and which have been offered in evidence?

A. Yes, sir.

Q. From the statements furnished to you by the officers of the San Joaquin Electric Company, as to the condition of the company on January 1, 1899, which has been offered in evidence, do those figures show the company to be solvent or insolvent?

A. Solvent.

Q. From the figures shown in the statements furnished you of the condition of the company on July 1st or June 30, 1899, do those figures show the company to be solvent or insolvent?

A. They show the company to be solvent.

Q. Can you state on what you base your judgment as to the solvency of the company?

A. The balance sheets submitted monthly, together with the statements in evidence, show the company to have a surplus income in excess of its expenses for the six months from January 1, 1899, to June 30, 1899, of $42,328.16.

Q. How much would it have required during that period to have met the interest on the bonds to have prevented a foreclosure?

(Objected to by counsel for complainant as incompetent, irrelevant and immaterial.)

A. $26,250.00.

Q. What surplus would that leave over and above the amount required to meet the interest on the bonds?

A. $16,078.16.

Counsel for intervenors, in their brief, copy this testimony relating to July 1st, but do not copy that part of the testimony relating to January 1st; but one part of the testimony is as reliable as the other. Counsel say that the statements cannot be set out in a brief. That is true, but it can be easily shown that the statements do not bear out the testimony of Mr. Coffin. The argument of counsel for intervenors is based upon the fact that the testimony shows that in 1897 the net earnings of the company, not including the charge of $31,500.00 interest, were $10,878.80. For 1898 the net earnings, not including interest, were $14,173.49, and for 1899, not including interest, they were $29,-957.28, and they assume that all of these amounts were on hand, and do not take into consideration any of the debts of the company. Now then, the interest for 1897, amounting to $31,500.00, was paid, so that

the above amount of $10,878.80 was used up, showing that during the year 1807, $20,621.20 had to be borrowed or obtained in some way to pay that interest. The interest for the first half of 1898, amounting to $15,750.00, was also paid, and that amounted to $1577.51 more than the entire net earnings of that year, and it must be remembered that the net earnings of that year were nearly all during the first half of the year, as the drought in the latter part of the year prevented any net earnings. The total indebtedness, therefore, incurred for the payment of interest alone for the year 1897 and the first half of 1898, amounted to $22,198.71. These facts are shown by the statements presented in the testimony of Coffin, above referred to, and also by the statements in connection with the testimony of W. R. Price, also a witness for the intervenors. [Transcript, p. 202.] He also testified [Transcript, p. 202], "There has not been enough money collected in the years 1897, 1898 and 1899 to pay interest."

It appeared by the testimony of Mr. Seymour [Tr. pp. 231-233, 258-9 and 262] that there were other debts of the company besides interest, and that money had been borrowed, and that he had made himself personally liable for debts of the company, and also that the money had to be borrowed to pay the six months' interest preceding the default.

Returning to the statements sent to Mr. Coffin and contained in his deposition, those statements show as the Court will see upon reference to them, that during the year 1898 the operating expenses, including the interest on the bonds, were $55,432.41; that the re-

ceipts were $38,105.90, leaving a deficit of $17,326.51. In addition to that there were liabilities amounting to $50,741.02 to pay which their resources amounted to only $37,697.30, and this amount included $30,000.00 of bonds, all of which bonds were put up as collateral for debts of the company.

Among the statements sent to Mr. Coffin and included in his testimony was an estimate of the revenues and expenses of the company for 1899. According to that estimate the receipts would amount to $61,350.48 and the expenses to $59,561.00, but that estimate was not realized. Statement follows showing the monthly receipts from January to June, inclusive, 1899, and also the monthly disbursements. This statement shows:

Balance on January 1st,	$ 1188 35
Receipts from consumers during the 6 months,	25062 82
From banks, etc.,	5193 89
Amount due from city for which warrants were held,	2833 58
Amount from Hanford branch,	3600 00
Total receipts for the 6 months,	$37878 64

The disbursements during the 6 months were as follows:

January:	Expenses,	$ 2876 18	
	Loans repaid,	2100 00	
February	Expenses,	3025 62	
	Loans repaid,	2400 00	
March:	Expenses,	2469 00	
	Loans repaid,	4875 00	
April:	Expenses,	2285 14	
	Loans repaid,	1650 00	
May:	Expenses,	2964 67	
	Loans repaid,	1000 00	
June:	Expenses,	2849 98	
	Loans repaid,	5676 06	
Paid Hanford extension to apply on construction of same,		3600 00	
			37771 65
So that there was on hand on the 1st of July, 1899. only the sum of			$ 106 99

This statement of receipts and disbursements also contains a statement as to the Fresno Water Company, and if the receipts and disbursements of the two companies are taken together for the six months, the receipts from both only amount to $113.14 more than the disbursements. The trial balance as appears by Coffin's deposition [Tr. p. 144] also shows that on the 30th of June, 1899, there was only $106.99 in the treasury and that there were bills payable at that time amounting to $17,750.00, not including interest on bonds and not including any debts due to the Water Company. The statement introduced in evidence of the condition of the company on April 30th, 1899, shows that at that time the balance on hand was only $422.83.

The Court will see therefore that on July 1st, 1899,

the company was in no better position to pay the interest on the bonds than it was in January. The statements submitted by Mr. Coffin show all the disbursements and what they were made for. There is no pretense that the loans repaid were not for *bona fide* indebtedness properly incurred in the management of the company. The difficulty about the argument of counsel for intervenors is that they assume that each year stands by itself, and that all the net earnings were on hand and applicable to pay the interest on bonds when over $22,000 had to be borrowed to pay the interest for 1897, and the first half of 1898, and of course had to be repaid.

Testimony was taken in Fresno and statements made by Mr. Price and Mr. Collier were introduced in evidence there. It appears by intervenor's exhibits, attached to those depositions, [Tr. p. 310] that the

receipts for 1897 were	$41,491.11
Expenses, including interest,	$99,572.96
Deficit,	$58,081.85
In 1898 the receipts were	$39,044.48
Expenses, including a half years interest,	71,017.54
Deficit,	$31,973.06
For 1899 the receipts were	$49,140.56
Expenses, without interest,	64,644.36
Deficit,	$15,503.80

These statements also show that in 1897 the company borrowed $58,127.01. In 1898, $33,161.41. In 1899, exclusive of receiver's certificates, $7,752.38.

It is idle in the face of all these figures to claim that the company was solvent on the 1st of July, 1899, or that it could at that time have paid interest on the bonds due the preceding January. Mr. W. R. Price was a witness for the intervenors and he examined the books and papers of the company and made statements therefrom. He testified as follows: "There has not been enough money collected in the years 1897, 1898 and 1899 to pay the interest, that is, to pay the running expenses and fixed charges" [Tr. p. 202], and he made no claim that the company was solvent. He also testified [Tr. pp. 207-8] that his statement showed that the Electric Company on the 1st of January, 1900, owed $46,000.00 more than it had funds and assets on hand to pay at that time. Mr. Seymour testified that he attributed their inability to meet their obligations for interest to lack of funds; that they had been in business relationship with the Municipal Investment Company of Chicago, who contracted to take bonds at 80 cents on the dollar. [Tr. p. 258.] They fell down on their contract before the plant was completed, and from that time on "we were simply with an unfinished plant on our hands with large debts coming in from all sides. We were simply at our wits' ends what to do, so we did the best we could at the time and were overwhelmed with debts all the time. We made provision as soon as we could to pay interest on our bonds in addition to our other perplexities. That was paid out of the sale of bonds up to a certain time (pp 259). Our plant was incomplete, we could not furnish power to customers unless we made additional improvements,

additional betterments, so that we were crowded on that account. Then the dry year came along and we had to shut down several months and that crippled us. If that dry year had been a favorable season we would have had a much better chance to pay the interest. *We would probably have gotten credit so as to have borrowed money to proceed, but we probably could not have gotten it out of the direct revenues.* (pp. 261) If we had had an ordinary year such as this year, we possibly could have pulled through. I explained to Mr. Street the entire position of affairs here, but told him as far as I could see in view of the condition of affairs, I saw no means of avoiding a six month's default. In addition to our other troubles we had a lot of floating indebtedness that I personally made myself liable for, loans on my personal assurance that they would be repaid. Those have been taken up. They were generally paid before the six month's default was made. The money was borrowed to pay the preceeding six month's interest." (pp. 262.)

So that it appears from the uncontradicted testimony that the company was deeply in debt. They not only had used all of their revenues, but had also used up their credit which they probably could have continued had it not been for the dry year.

It is true that the receiver is now doing better and he testifies that in the course of a few years he might be able to pay the back interest.

Counsel for complainant did not admit, on the argument and it is not shown by clear and undisputed testimony, as stated in brief

of counsel for appellants, that the company is now solvent and able to pay all its debts, including the interest on its bonds. It does appear, however, and was so stated on the argument, that Mr. Seymour testified that the company is now earning enough to pay its current interest, and in the course of three or four years might pay the back interest, but that does not make the company solvent or able to pay its debts now, and no such admission was ever made.

The company was not only insolvent in fact, but it was insolvent within the decisions.

When a company is unable to pay its currently accruing interest it is actually, as well as technically, insolvent, and its property is inadequate security for its mortgage debt.

Central Trust Co. v. C. R. & C. R. Co., 94 Fed. Rep. 275, 282;

Dow v. M. & L. R. Co., 20 Fed. Rep. 260.

So that even if the company could pay its interest in the course of three or four years, it is now insolvent, but we are dealing with its present condition, and it certainly cannot be seriously claimed that the court has a right to compel us to abandon or postpone foreclosure proceedings, because under the wise and prudent management of the receiver the property is in better condition than it was when the suit was brought.

This question of the solvency or insolvency of the company is not important upon this intervention, unless it has been shown that there was fraud, incompetency or neglect on the part of the trustee, for when

the company defaulted in its interest, and the requirements of the mortgage were complied with so far as demand, etc., are concerned, the right to foreclose was complete, whether the default resulted from either inability or unwillingness to pay.

Bondholders will not be allowed to intervene in suits of foreclosure brought by trustees for their benefit where there is no fraud or neglect on the part of the trustees.

Richards v. C. & O. R. R. Co., 20 Fed. Cases 692; No. 11,771;

Skiddy v. A. M. & O. R R., 22 Fed. Cases 274; No. 12,922;

1 Foster, Fed. Practice, 333;

F. L. & T. Co. v. K. C. W. & N. W. Ry. Co., 53 Fed. 182;

Sands v Greely, 80 Fed. 195;

Clyde v. R. & D. R. R. Co., 55 Fed. 445;

Toler v. East Tenn. V. & G. Ry. Co., 67 Fed. 168.

The law is well stated by Goff, Circuit Judge, in the case of Clyde v. Richmond & Danville R. R. Co., 55 Fed. Rep. 445, 448, as follows:

> "It will not be presumed that the trustee will be unfaithful to the trusts confided to it, and it will be time enough to consider the question of making the bondholders or their committees parties for their own protection when the trustee fails to promptly and faithfully discharge its duties. It will not do to permit bondholders in such proceedings as this to become partners in their indi-

vidual capacity, or by committees, without showing why their interests will not be properly guarded by the trustees elected when the trust was executed, and then fully authorized to represent them. It would produce great trouble, cause endless confusion, and needlessly incumber the record, to permit the holders of bonds and coupons secured by mortgages to make themselves parties in foreclosure proceedings without assigning cause. The holders of bonds, coupons and stocks are constantly changing, and if they are proper and necessary parties to such litigation, it will be difficult to mature such cases for hearing; and in many instances, particularly in the courts of the United States, the jurisdiction of the court might fail or be questioned when the transfer of ownership was made.

"I think the rule is now well established that the individual bondholder and the separate beneficiary will not be made parties to suits relating to the mortgage or trust deed, unless it is alleged and shown that the trustee is incompetent, or for some reason cannot faithfully represent the *cestui que* trust."

The court will notice that the rule, as stated in that case, is that individual bondholders will not be made parties, unless it is alleged and *shown* that the trustee is incompetent, or for some reason cannot faithfully represent the *cestui que* trust.

In Richards v. C. & O. R. R. Co., 20 Fed. Cases 692 No. 11,771, it was decided that where trustees have undertaken by legal means to foreclose a mortgage, no bondholder has a right to proceed in his own name to foreclose, and he can ask the aid of a court of equity

only on the ground of unfaithfulness, neglect or inability on the part of the trustees.

The case of Skiddy v. A. M. & O. R. R. Co., 22 Fed. Cases 274, No. 12,922, is a very strong one against the right of bondholders to intervene in a foreclosure suit brought by trustees.

The portion of the opinion relating to the matter is found on pages 285-7. The bonds were owned about equally in Amsterdam and in London and the Dutch and English bondholders could not agree upon a plan of reorganization. The plan of the English bondholders had the approval of the trustees and the Dutch bondholders asked to be made parties to the suit. In denying the application, the court said:

The sole objection is that among the bondholders themselves there has arisen a dispute respecting the reorganization of the defendant company, and that the trustees or their counsel have, in consultation with such bondholders as they have had access to, given preference to the plan of one party of the bondholders rather than to that of the other. No allegation is made, however, that this preference has been expressed in any proceedings taken in court, or that it has influenced in any way the conduct of the suit on the part of the trustees.

Of course in every cause in equity all the parties in interest must be made parties to the suit; but in the case of Richards v. Chesapeake & O. R. Co. [Case No. 11,771], this court has already held that to foreclose a mortgage given by a railroad company to trustees to secure the payment of bonds and coupons mentioned in it, as they mature, the trustees are the only necessary parties to the suit; that the proper parties to be defendants are the parties who hold or claim in opposition to them, is equally clear. In order, therefore, to disturb the rights of the trustees to bring and conduct this suit, in which they represent every bondholder known to the mortgage, at the instance of such a bondholder, it must be shown to the court that the trustees have done, or contemplate doing, in the cause some act which will be detrimental to the interest of such bondholder or set of bondholders. This is not averred or proved in the matter of this petition. It is alleged that the trustees have approved a plan of reorganization proposed by one set of bondholders rather than another. But the court cannot consider any proceedings among the bondholders or trustees which are not the subject of proceedings in this court and this cause, so that until it is proved, as it is not now asserted, that the trustees under this mortgage, ought not, by reason of negligence, fraud, or incompetency, to conduct this suit, the petitioners havs no right to ask that they be appointed plaintiffs to share in

such conduct, or to conduct it wholly themselves I know of no instance in a case of foreclosure of a railroad mortgage where the trustees have been displaced or required to take an adjutant bondholder to assist in the conduct of a suit, except where some malfeasance or incompetency is alleged on the part of the trustee. But the petitioners ask in the petition, as amended, at once to be made parties, whether plaintiff or defendant, and cite numerous instances where the courts have allowed bondholders of different interests or classes, who though represented by the same parties, had or thought they had, different interests to be defended or asserted, from others represented under the same mortgage or deed of trust. It seems to me none of these cases apply to the matter of this petition. There is but one class of bondholders under this mortgage. The interests of each bondholder are identical Some of the bondholders have moved the action of the trustees and others have not. The one are active bondholders and the others are inactive. Some of them are represented by one committee and others are represented by another. but this does not constitute a class of bondholders; their interests are identical, and one might as well say that because bondholders under the same mortgage were represented in court by different counsel, that constituted them a different class of bondholders, and that they were, because represented by different persons, entitled to be parties to the suit.

The court further said: "The moment a petition is presented to this court by any party interested in the conduct or result of this suit, which alleges that these trustees are derelict, incompetent or partial in any action they propose to the court, that petition shall be, as it is entitled to be, respectfully heard, and if after consideration of the proof it shall be ascertainecd that the petitioner is correct, the trustees will be removed and the boldholders allowed to conduct the suit in their own way without the intervention of trustees, except so far as they may be nominal parties to it."

It will be seen that proof as well as allegations are required before a bondholder is allowed to intervene, and there must be a hearing. In this case the court adopted the plan of having a hearing the same as in an equity suit, and after that hearing decided that the bondholders had not proved any right to intervene.

Now then, has it been shown in this case that the trustee has been guilty of fraud or neglect or is incompetent or cannot faithfully represent the bondholders?

By reference to the bill of intervention it will be seen that the allegation was made that the defendant on the 1st of January, 1899, was possessed of ample means, income and resources to pay the interest falling due on that day and to meet all its debts and obligations due and to become due, including the accrued and accruing interest on all of its said bonds. It was further alleged that instead of applying said means to the payment of its obligations, including the interest, its officers and directors conspired together and diverted its funds to other purposes. [Tr p. 67.] It was further alleged that the officers of the company facilitated the foreclosure of the mortgage by fraudulently and purposely and unnecessarily allowing the interest upon said bonds to become and continue delinquent for the term of six months. [Tr. p. 69.] It is also alleged that it was contrived and agreed by and between the parties to this action and the bondholders at whose instigation the said foreclosure proceedings were begun, that the said company should default in the payment of interest upon its bonds, and that in pursuance to said conspiracy the defendant company failed and refused to pay the interest on its bonded indebtedness as it became due, though possessed of abundant means and resources so to do. [Tr. p. 70.] It was alleged that a plan for reorganization was conceived and inaugurated and the plan thereof determined upon before the default had been made in the payment of interest upon said bonds, or

any of them, and that if said plan and scheme of reorganization had not been determined upon, the officers of the company would not have allowed the interest upon said bonds to become delinquent. [Tr. p. 72.] A further allegation is made, [Tr. pp. 72-3], that at the time of said default in the payment of interest, the defendant was solvent and possessed of ample property, income and resources to meet all of its just debts and liabilities, including the interest on said bonds, and that said interest might have been and would have been paid out of the ordinary revenues and receipts of said company but for the purpose and intention of the officers of the defendant company and the bondholders to bring about a foreclosure of the mortgage and a reorganization of the company.

It will be noticed that all of the allegations of the bill are made with reference to the default occurring on January 1st, 1899, and that the default on that day occurred because of a proposed plan of reorganization, and that on that day the defendant was possessed of ample means to meet all of its just debts and obligations, including the interest upon its bonded indebtedness. There is no allegation anywhere in the bill that anything occurred subsequent to the 1st of January, 1899, to induce the continuance of a default or foreclosure proceedings, and nothing of that kind was heard of until the testimony was taken.

It has already been shown conclusively from the testimony taken by the intervenors that the defendant had no resources with which to pay the interest due either on the 1st of January or the 1st of July, 1899,

and further that the intervenors have utterly failed to prove that there was any fraud or neglect on the part of the trustee, the company, the bondholders, or anybody else.

It is admitted by counsel for appellants that the defendant was unable on the 1st of January, 1899, to pay the interest falling due on that date, but they claim that with what money there was at that time and what was on hand on the 1st of July, 1899, the defendant could on the 1st of July have paid the interest falling due on the 1st of January, 1899, and thus have prevented a six-months default of that interest, but no claim was made that the defendant could have paid the July interest when it fell due.

The evidence relied on to show that a plan of reorganization was agreed upon is that of the witness Coffin, but his testimony entirely fails to show such agreement. He testified that the first negotiations he knew of were begun in London in April, 1898, and were conducted by C. H. Coffin and William O. Cole, representing the San Joaquin Electric Company and Capt. Nares representing the Fresno Water Co., and contemplated the absorption of the San Joaquin Electric Company and the Fresno Water Company by the Fresno Canal and Irrigation Company. The American Securities Agency, Limited, were in no way interested in those negotiations. Mr. Coffin and Mr. Cole represented the stock of Seymour and Eastwood. Those negotiations were not carried through and they finally failed in December, 1898. [Tr. pp.154-5.] Even Coffin did not claim that the Mercantile Trust Company, the com-

plainant, ever knew or heard of those negotiations. The next negotiations he testified to were in January, 1899, when, according to him, the parties interested in the property were presented with a plan of reorganization which he drew up early in January, 1899. [Tr. p. 155.] He also testified that at that time the General Electric Company of New York was represented by Dr. Addison, their California agent; that Charles F. Street, of Street, Wykes & Co., represented the American Securities Agency, Limited, who claimed to represent a majority of the bondholders of the San Joaquin Electric Company. Mr. Elijah Coffin represented 43,000 of the bonds of the San Joaquin Electric Company and the British Linen Bank of London represented nearly half of the bonds of the San Joaquin Electric Company. E. H. Gay of Boston represented the bondholders of the Fresno Water Company, John J. Seymour and Mr. Eastwood holding a majority of the stock of the San Joaquin Electric Company, and Mr. Drexler of San Francisco, representing the owners of the Gas Company of Fresno. No meeting was held. Coffin drew up the plan of reorganization which was submitted to the parties. Mr. Street was in Chicago and consulted with Coffin about it. Mr. Elijah Coffin was there. The other interests were all consulted by letter. Those negotiations were first pending or contemplated early in January, 1899. There had been previous conversations with some of the parties interested with the same end in view. The first consultations and conversations were held prior to

the default in the interest on January 1st, 1899. [Tr. p. 156.]

Coffin does not testify what that plan of reorganization was, and we do not know a single one of its terms, but as he prepared it, he certainly would not say that it was improper or that it did not protect all parties interested, neither would he claim that charges of fraud or collusion could be predicated upon it. All he testifies to is that he drew up the plan of reorganization, consulted personally with Mr. Street and Mr. Elijah Coffin about it, and that the other interests were consulted by letter. There is no testimony as to what their replies were, or whether any of them agreed to it. It does not appear that it was in any respects similar to the alleged plan of reorganization set out in the bill in intervention. It will be noticed that at that time, according to Coffin, the American Securities Agency, Limited, claimed to represent a majority of the bonds of the San Joaquin Electric Company, but he also stated that Elijah Coffin represented $43,000.00 of the bonds and the British Linen Bank of London represented nearly half of the bonds, and there is no testimony that at any subsequent time those representations were in any way changed or that at any time the American Securities Agency, Limited, or Mr. Street, represented more than a bare majority of the bonds. Coffin's testimony is simply that the American Securities Agency, Limited, claimed to represent a majority of the bonds, but is positive that Elijah Coffin represented $43,000 of the bonds and that the British Linen Bank of London represented nearly half of them. He

does not say how he knows that the American Securities Agency, Limited, claimed to represent anything.

This testimony is important in connection with the claim made by counsel for intervenors in their brief that the Court can consider the hearsay testimony of Coffin as to what Street said, because it nowhere appears, even by hearsay testimony, that Street, or the American Securities Agency, Limited, ever represented the Mercantile Trust Company, the complainant, or anything more than a bare majority of the bonds.

The Court will also notice that Coffin testified, as above stated, that prior to the time when his plan of reorganization was drawn up in January, 1899, there had been conversations with some of the parties interested with the same end in view, and that the first consultations and conversations were held prior to the default on the interest on January 1st, 1899; but he nowhere states with which one of the parties those conversations were had, and from all that appears from the testimony they may have been held with the parties representing the Gas Company of Fresno or the General Electric Company of New York or with E. H. Gay representing the bondholders of the Fresno Water Company.

The witness Coffin was shown the original plan of reorganization contained in the bill in intervention and stated that it was prepared by Charles F. Street, endorsed by the American Securities Agency, Limited, and submitted to the bondholders of the San Joaquin Electric Company in London, and that this plan was first contemplated in January or February, 1899. He fur-

ther testified that he did not know whether the plan of reorganization grew out of or was connected with the conversation he had prior to January 1st, 1899, and as no one else testified that there were any negotiations prior to that time, that question may be considered disposed of. [Tr. p. 157.] Being asked how he knew it was presented to the bondholders in London, he stated that he himself was the holder of two bonds and received this plan from the American Securities Agency, Limited, and that his recollection was that the notice stated that they had considered it and approved of it in London. [Tr. p. 158.] He did not know of his own knowledge that it was submitted to any of the bondholders in London, and the notice which he claimed to have received was not produced and the alleged contents of that notice, of course, cannot be considered. But if, by any chance, his testimony could be considered at all upon this point, then it is to the effect that it was presented to all the bondholders in London, and the intervenors were London bondholders. The witness then testified as to conversations with Mr. Street in regard to the proposed plan of reorganization and stated that Mr. Street said it was presented to the bondholders in London at the close of January or early in February, 1899. He did not state when those conversations took place, but did say that Mr. Street came to Chicago about January 20, 1899, and that he and Coffin discussed Coffin's plan of reorganization, of which Mr. Street expressed entire approbation, but said that he had been instructed by the American Securities Agency, Limited, to proceed to Fresno and make a complete ex-

amination and report to London in person if possible, which he did early in 1899, as he told Coffin [Tr. p. 160]. It seems from this testimony that the alleged plan complained of could not have been under consideration between Mr. Street and Mr. Coffin when Mr. Street saw Mr. Coffin in January, 1899, because Coffin's plan was then under consideratin.

Mr. Coffin further testified that when this suit was commenced the Mercantile Trust Company had notice and knowledge that the purpose of the foreclosure was to bring about a reorganization of the company, and that Mr. Street had said something about the commencement of foreclosure proceedings depending upon agreeing upon a plan for the reorganization of the company [Tr. pp. 164–5]. On cross examination he said: "I would state from memory that Mr. Street informed me that the Mercantile Trust Company had knowledge of the proposed plan of reorganization before the suit was brought." [Tr. pp. 173-4.] He further stated, however, that he did not know of his own personal knowledge that at the time this suit was brought the Mercantile Trust Company had notice or knowledge that the proposed foreclosure was to bring about a reorganization; that he had no personal knowledge as to what the Mercantile Trust Company knew at the time it filed this suit about a plan of reorganization, except by hearsay. [Tr. pp. 174-5]. On re-direct examination he stated that his recollection was that he was informed by Mr. C. F. Street as to the knowledge of the Mercantile Trust Company that the foreclosure was brought for the purpose of affecting a reorganization of

the San Joaquin Electric Company and the Fresno Water Company,, but that consisted simply, according to his testimony, in a statement of Street that he had arranged with the Mercantile Trust Company to reduce the expense of foreclosure. [Tr. pp. 177-8.] He nowhere testified that Street had told him that he had informed the Mercantile Trust Company, or any of its officers, in regard to any plan of reorganization, or its purpose.

Right here it is proper to state that no matter who Mr. Street represented, it did not appear anywhere, even by hearsay, that he represented the Mercantile Trust Company, and he could not bind that company by his statement, nor could their knowledge be proved by hearsay testimony of anything that he had stated. His agency for anything was not proved by any competent testimony, and what testimony there was only showed him to have been the agent of the American Securities Company, Limited, and that agency only represented a bare majority of the bonds. The intervenors are the holders of only 78 of the bonds of the par value of $36,000, and they do not assume to represent the bonds testified by Coffin to have been represented by Elijah Coffin and the British Linen Bank of London. Neither was there any testimony that the American Securities Agency, Limited, represented at any time any of those bonds. The complainant represents all the bondholders, and whatever may be said about alleged statements of Street, they could not bind or affect the complainant nor the large minority of bondholders whom neither he nor the American Securities Agency, Limited, assumed to represent. But the

testimony was incompetent for any purpose and does not bind or affect anybody. No plan of reorganization or agreement for reorganization executed by anybody was presented to the Court and no attempt was shown to compel the production of any such paper and there was not a syllable of testimony that any such paper ever existed or that any such arrangement was ever completed. The plan, if it ever existed, being in writing, oral testimony, and especially hearsay oral testimony, is incompetent to prove that such agreement was made.

Coffin's own testimony in regard to this alleged plan of reorganization related to its supposed approval by the bondholders. He no where testified that he had any knowledge whatever about any agreement on the part of the officers of the company as to the plan of reorganization, or that he knew anything about their being connected with the plan of reorganization in any way and he did not attempt to swear that the plan of reorganization had been agreed upon between the Mercantile Trust Company or the bondholders and the company, and he did not swear that anybody had ever told him so.

More than all this, his testimony as to the time this alleged plan of reorganization was thought of must be false, because there was a meeting of the bondholders held in London in March, 1899, at which there were present A. Y. Chick, one of the intervenors, and his attorney, John Hart. Mr. Chick's deposition was taken by the intervenors and in that he stated that he attended one meeting, and one meeting only of the bond-

holders of the San Joaquin Electric Company, at the invitation of the American Securities Agency, Limited. He could not remember the date of the meeting, except that it was during the year 1899. [Tr. p. 190.] His attorney, John Hart, however, in his deposition stated that the meeting was about the end of March, 1899, and that that was the only meeting he attended. [Tr. p. 194.] So that it must be considered as certain the meeting was in March. Mr. Chick further testified that at that time no definite scheme of reorganization was submitted; that a scheme of reorganization was discussed generally, but it was in too crude a form for him to form any opinion in regard thereto; that he had never seen or read the proposed plan of reorganization set forth in the bill of intervention, and that a copy of it had never been sent to him, or his firm He further stated that he did not know whether any agreement had been made with Seymour and Eastwood to deliver to them any stock in the proposed new corporation. [Tr. p. 190-2.] Mr. Hart also testified that no definite scheme of reorganization was presented at that time, and that the only thing that took place was an informal discussion as to some scheme of reorganization. [Tr. p. 194.] At that time, therefore, the proposed plan of reorganization could not have been drawn up and Mr. Coffin is in error as to the time he received a copy of it, because the purpose of the meeting was to discuss some scheme of reorganization between the bondholders, and it is evident that no scheme of reorganization had at that time been

agreed upon, even among the bondholders, and if any scheme or plan had been proposed by anybody, no reason is apparent why it should not have been submitted at that meeting.

In connection with this testimony of Mr. Chick, we desire to call attention to the fact that he is the one who verified the petition for leave to intervene upon which the bill in intervention was allowed to be filed, and verified it absolutely, after the court had decided that leave to intervene could not be granted upon a petition verified upon information and belief, and in that petition it was stated absolutely that the plan or reorganization had been adopted. How Mr. Chick can reconcile this verification with the sworn statement in his deposition that he never saw the plan of reorganization and never heard it discussed, we leave it to him and the Court to determine.

Now Coffin having failed to testify as to any connection of the officers of the defendant company with the proposed scheme of reorganization, there is no testimony whatever, even hearsay, to connect them with it. The only testimony as to any connection of the officers of the defendant company with the proposed scheme of reorganization not hereinbefore referred to was the testimony of the witnesses Seymour and Eastwood, which was taken by the intervenors. Part of that testimony has been recited by counsel for appellants in their brief. The testimony of these witnesses was absolutely uncontradicted. Mr. Seymour stated that Mr. Street came to Fresno in March or April, 1899, with letters representing that he represented a majority of

the bondholders and wanted to look at the books of the company and investigate the state of affairs, and he did so; that was the only representative of the bondholders that he saw. [Tr. p. 258.] Coffin, therefore, must have been wrong when he testified that Mr. Street went to Fresno to make his examination and report to London thereon early in February, 1899, for according to Mr. Seymour, Mr. Street did not go to Fresno to make this examination until in March or April, and at that time the alleged plan of reorganization had not been thought of. At the time Mr. Street was out there Mr. Seymour explained to him the entire position of affairs, and told him that so far as he could see in view of the condition of affairs he saw no means of avoiding a six months' default. [Tr. p. 262.] He testified as follows: The first time I ever heard any definite statement in regard to the matter of reorganization was after we had defaulted six months on the bonds. I heard so in New York City. I saw that plan. I was on there. I talked with Mr. Street and it was shown to me. [Tr. p. 269.] This testimony is uncontradicted by anybody. Even Coffin does not pretend to say that Seymour or Eastwood, or anybody connected with the company, ever saw the plan of reorganization before that time.

Mr. Seymour further testified: I do not know where the idea of reorganization originated. When Mr. Street was out here (which was in March or April) he outlined in a vague way some reorganization under which he proposed to reduce the amount of indebtedness and after we saw him he went to England. It was while

they were in England, I understood, that the plan was elaborated. [Tr. p. 270.] Mr. Street was not here before our defalcation in the interest of January 1st, 1899.

I never saw him until after our first default actually occurred. He did not undertake to outline to me what the plan of reorganization was. He did not ask me to co-operate. He said he was not employed to do anything definitely. He was simply here finding out the condition of affairs so that he could go back and make a report. I first saw this proposed plan of reorganization in New York City sometime in July after the first six months default and after notice of demand for payment was made by the Mercantile Trust Company. That was after the first six months had expired. Mr. Street made a proposition to me that he would have me appointed receiver if I would make no formal defense as a stockholder or as president of the company against foreclosure proceedings and I declined to do so. [Tr. p. 271.] Afterwards he made a proposition that he would have the Mercantile Trust Company act, asking that I be appointed receiver if I would agree to conduct it under ordinary business principles, and so I went in without any obligation whatever. The only thing was that I would not charge more than a certain amount, provided the Judge granted me more than that as receiver's salary. The idea was to not load it up with undue receiver's salary. That matter of reorganization was never taken up and acted upon by the local stockholders here. No consent was ever given by any local stockholder to that or any other plan of reorganization that I know of. Mr. Eastwood and I owned a control-

ling interest in the stock and that is the condition at the present time. I presume the fourth clause in regard to the issuing of $100,000.00 of the capital stock to certain parties in Fresno refers to Mr. Eastwood and myself. That provision was called to my attention at the time I had the consultation with Mr. Street. [Tr. pp. 272-3.] And then he testified as set out in appellants' brief.

There was no testimony that the plan of reorganization was agreed to or ever consummated and Seymour testified that after he was appointed receiver there never was any further negotiations in regard to this plan of reorganization. He says: It has never come up again, and so far as I know if the foreclosure should result and this property be sold my interest would be lost entirely. I have no assurance that I will get anything out of it either in the way of capital stock in a new company if reorganized, or in any way. [Tr. pp. 274-5.]

Mr. Eastwood testified: I first heard of this proposed reorganization of the company in July, 1899. I do not know from whom that proposition came. I learned of it from Mr. Seymour. I did not have any talk with Mr. Street about it when he was out here on his first visit. I was not invited to join in that plan of reorganization. I suppose the clause with respect to allowing somebody in Fresno $100,000.00 of the capital stock referred to us, but I never heard it said. I know of nobody else so situated that it could have had reference to them. When I learned of the proposed reorganization I learned of that feature of it from Mr. Sey-

mour. No consent was ever given by me to the reorganization of the company in any terms. I do not believe myself there is any reason or necessity for the reorganization of the company. [Tr. p. 283.]

The testimony of these witnesses, who were called by the intervenors, was given fairly and there is no reason in the world for discrediting any of their testimony and there is not a particle of contradiction of it anywhere in the case.

The deposition of Henry C. Deming, Vice President of the complainant, was taken by the complainant, and he testified that except so far as he has been informed by the papers in this matter he has never been aware of any proceedings for the reorganization of the San Joaquin Electric Company; that he did not recall any conversation with any of the bondholders with regard to any reorganization of the company and that he would be likely to recall any such conversation in case the Mercantile Trust Company was asked to do or not to do certain things in connection with such proposed reorganization. He further testified that he had not entered into any arrangement or agreement for any reorganization of the defendant company or to represent any one class of bondholders as against any other class of bonds and that he should be likely to know it if any other officer of the complainant had done so. [Tr. p. 338.] On cross-examination he testified that at the time this action was commenced he knew nothing of any scheme or reorganization proposed by Mr. Street or by the American Securities Agency, Limited; that there was no arrangement made with the Mercan-

tile Trust Company for the deposit of the securities under that plan and that he had no knowledge as to any reorganization and that the bonds had not been deposited. [Tr. p. 339.] Mr. Deming at the beginning of his deposition stated that in the ordinary course of business of the Mercantile Trust Company he, together with the Secretary, had the principal charge of matters concerning corporate trusts and that in the course of his duties he was ordinarily informed as to such trusts and of any proceedings taken to enforce them, and that he was the one who saw Mr. Street when the demand was made for foreclosure. [Tr. p. 337-8.]

The court will notice upon an examination of the alleged plan of reorganization [Tr. p. 52] that it made no reference whatever to the Mercantile Trust Company, and there is no testimony that anything whatever has been done under said alleged plan. In the face of the testimony of Mr. Seymour and Mr. Eastwood that it never was agreed upon, and in the absence of any testimony that it was, it seems as if that plan was pretty effectually disposed of.

We have gone into the matter fully in view of a question of the Circuit Court at the close of the oral argument as to what would be the effect of the solvency of the defendant company on the 1st of July, 1899, in connection with the knowledge of the officers of the defendant company at that time of the proposed plan of reorganization, and the review of the testimony which has been made shows beyond question not only that the defendant company was not solvent and had no money

on hand with which to pay interest on the 1st of July, 1899, but also that at that time no officer of the company knew anything about the alleged plan of reorganization or had ever seen it. But if they had, it would make no difference, because the complainant was not connected with it in any way, and even in the hearsay testimony of Coffin only a portion of the bondholders are shown to have known anything about it, and that hearsay testimony was argumentative to the effect that it probably was sent to the other bondholders because it was sent to Mr. Coffin, who owned two bonds. Mr. Chick testified that his firm was the owner of 78 bonds and that they never saw it. [Tr. p. 190.] How many of the other bondholders never saw it we cannot tell. The chances are it was not in existence as a plan until sometime in July, because it was not presented at the meeting of the bondholders in London in March, and Mr. Seymour states that he never saw it at all till July.

In the case of Farmers Loan & Trust Co. v. L. N. A. & C. Co. Ry. Co., 103 Fed. Rep. 110, it was decided that a decree foreclosing mortgages on a railroad cannot be impeached because of a prior agreement between a committee of bondholders and officers and directors of the company to form a reorganized company, and purchase the property at the sale, and thereby relieve it from the unsecured debts of the company, even though it is a part of such agreement that stockholders of the old company may obtain stock in the new on payment of a small difference, where the mortgages are due because of default in the payment of interest, and the company is in fact insolvent, and it does not ap-

pear that the trustees who brought the suit are parties to or had knowledge of the agreement, or that the default which matured the mortgages was due to such agreement.

In the same case in answer to a charge that there was a fraudulent agreement between bondholders and stockholders, the Court said, [Tr. pp. 123-4], "But a more radical, and as it seems to me, fatal defect in the petition is the failure to allege that the trustees in the several mortgages participated in or knew of the wrongful purpose attributed to the bondholders' committee and the officers and directors of the New Albany Company; and, if the averment had been made, it would have been without support in the evidence. There being no question but that the mortgages foreclosed were valid and an installment of interest upon the bonds secured thereby overdue and unpaid when the suits were brought, no agreement, conduct or purpose, however fraudulent or wrongful, of Mills and the officers of the railway company, in respect to the proceedings of Mills or the bondholders' committee and the officers of the company or of any syndicate, could be ground for an attack upon the decree of foreclosure, *unless the trustees knew of the intended wrong and prosecuted the suits to a decree and sale for the purpose of aiding in its consummation*. And even in such case, unless it were shown that the holders of the bonds secured by the mortgage were also implicated in the scheme, on what ground or theory could equity interfere?"

In this case it is certain that the company defendant was absolutely insolvent on the 1st of January, 1899,

and that it was in no better condition on the 1st of July, 1899, except as appears by some of the statements presented by intervenors that it had paid some of its indebtedness. Mr. Seymour testified on cross-examination: I cannot state what the condition of the company was with reference to its debts over and above its assets on the 1st of January, 1899, when we defaulted in our interest. I will simply state that we had not the amount of funds on hand to meet the interest payment, nothing like, and by no means of financing could we collect enough.

Q. What efforts, if any, did you make towards securing the amount of money to pay your interest? [Tr. p. 301.]

A. I exhausted my credit six months previously. I had to borrow extensively then on my own personal assurance of repayment. [Tr. p. 302.] When we made default we could not borrow any more money of the Water Company because it did not have any more than enough to pay its own interest on bonded indebtedness. It was becoming gradually and is now in a position of being partially defaulted on its bonds by reason of attempting to bolster up the other company. [Tr. p. 303.]

Mr. Seymour testified absolutely that he never made any agreement not to make a defense to the foreclosure suit. [Tr. p. 271.] But what kind of defense could have been made? The six months' default had occurred and the trustee had a right to and was required to foreclose. There was no defense at the time

the suit was brought and there has never been any defense since.

On pages 16 and 17 of appellant's brief charges are made that the prosecution of this foreclosure suit is in bad faith. We do not understand that these charges are made against the trustee, and there is no foundation for them so far as the bondholders are concerned. If a right to a foreclosure has accrued, the Court cannot consider either the necessity for bringing the suit nor the motives which induced it.

Toler v. Tenn. V. & G. Ry. Co. 67 Fed. Rep. 168, 177.

That was a case in which the bonds were not due, and it was claimed in that case, as in this, that there was no reason why there should be a foreclosure, although there had been a default, and further, that the suit was brought in order to enable complainants, or somebody associated with them, to obtain the property at a low price. Commenting upon that, the court said:

> "If the minority bondholders have a legal right to have the mortgage foreclosed, which is hopelessly in default, none of these matters offer a material defense. * * * If they have sought to depress the market by the means described, their conduct is reprehensible; but I know of no authority for saying that thereby they have deprived themselves of their right of foreclosure, if any they have. * * * Whether complainants are conducting this suit from good or bad motives, for their own benefit or for the benefit of another, is immaterial. It is no defense to a legal demand instituted in the mode and according to the practice

of this court that the complainant is actuated by personal or improper motives. The motive of a suitor cannot be inquired into. Were it otherwise, nearly every suit would degenerate into a wrangle over motives and feelings;" and then cites from Farmers' L. & T.Co. v.G.B. & M.R.Co., 6 Fed. Rep. 111, as follows: "There are allegations to the effect that the object of Blair and Dodge and their associates was to obtain ultimate control of the mortgaged property, but the proceedings to foreclose the mortgage were necessarily public. The sale following the decree must likewise be public and open to all bidders. Confirmation of the sale by the court must of necessity also be open to the resistance of any party in interest, if the sale should not be fairly conducted, or if there should be such inadequacy of price as might involve a sacrifice of the property, or injury to the parties interested."

The same citation is also made, and the decision is followed and approved in Guardian Trust Co. v. White Cliffs Portland Cement & C. Co., 109 Fed. Rep., 530.

This suit was brought in good faith because complainant had a right and was bound to bring it. Everything required to be done before the bringing of the suit was done. It was proper for a receiver to be appointed, because the company was insolvent. There was not and could not be any defense to the action. The intervenors have not shown that the trustee has been guilty of any fraud, incompetency or neglect, or that they have any right to be heard, and the complainant is entitled to a decree as prayed for in its bill.

So far as the intervention is concerned, we submit that the Court properly decided that the order granting

the intervening bondholders leave to become parties be vacated and their bill in intervention dismissed.

Farmers' Loan and Trust Company v. K. C. W. & N. W. R. Co., 53 Fed. Rep. 182, 196. In that case it was stated by Judge Caldwell that,

> "If bondholders could become parties for the asking we should have as many parties to these suits as there are bondholders, and the Court would be compelled to listen in turn to the views of every bondholder on every question arising in the case. This is wholly inadmissible. Unless fraud or bad faith is alleged against the trustee, the individual bondholders will not be permitted to intervene, and will not be heard to complain of any action of the Court based upon the consent of the trustee acting in good faith.
>
> "The order granting these bondholders leave to become parties was improvidently made and will be vacated and their petition dismissed. The trustee is quite as capable of defending the estate against any unfounded claim as these bondholders, and it is apparent that it is acting in good faith in that regard."

Of course the same rule applies, in the absence of proof of fraud or bad faith, which applies in the absence of allegations of such fraud or bad faith. In this case there was absolutely no proof to justify intervenors becoming parties to the suit.

ALEXANDER & GREEN,
CHAS. MONROE,
Solicitors for Mercantile Trust Company, Appellee.